88-1215

Supreme Court, U.S.
FILED
JAN 23 1989
JOSEPH E. SPANIOL, JR.
CLERK

No. . . . . , Misc.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

PEGGY AULT,

Petitioner,

v.

HUSTLER MAGAZINE, INC., a California corporation; LARRY FLYNT, a citizen of California; FLYNT DISTRIBUTING COMPANY, INC., a California corporation; FLYNT SUBSCRIPTION COMPANY, INC., a Nevada corporation; L.F.P., INC., a California corporation; BAY NEWS, INC., dba Fred N. Bay News Company, an Oregon corporation; BAY NEWS INC., an Oregon corporation,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

G.L. SPENCE
GARY L. SHOCKEY
SPENCE, MORIARITY & SCHUSTER
265 W. Pearl Street
Jackson, Wyoming 83001
Counsel for Petitioner.

I

QUESTIONS PRESENTED

1. Is a pornographic verbal depiction of Peggy Ault in *Hustler Magazine*, which the United States Court of Appeals for the Ninth Circuit recognized as "initially defamatory," coupled with a photograph of Peggy Ault obtained by fraudulent means published in the naked rear end of a bent-over man, entitled to be classified as protected opinion?
2. Does the classification as protected opinion of a pornographic verbal depiction of Peggy Ault in *Hustler Magazine*, which the United States Court of Appeals for the Ninth Circuit recognized as "initially defamatory," coupled with a photograph of Peggy Ault obtained by fraudulent means published in the naked rear end of a bent-over man, exceed the scope of protected opinion contemplated by Gertz v. Welch?

3. Should this Court review the decision of the United States Court of Appeals for the Ninth Circuit in order to delineate the parameters of what is protected opinion in order to guide future decisions concerning pornographic attacks such as *Hustler* directed at Peggy Ault?
4. Should this Court resolve a conflict in the tests for what is protected opinion between the United States Courts of Appeal for the Second and Ninth Circuits?

5. Is it an unlawful intrusion, misappropriation of image, or a public disclosure of private facts for a pornographic publication like *Hustler* Magazine to obtain a photograph by illegal means and false pretense, superimpose it over the rear end of a bent over naked man, and accompany it with a malicious attack on Peggy Ault?

TABLE OF CONTENTS

QUESTIONS PRESENTED I

TABLE OF AUTHORITIES III

OPINION BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASON FOR GRANTING THE WRIT.. . 10

The decision below is an unjustified extension of Gertz v. Welch, 418 U.S. 323 (1974) and Hustler Magazine, Inc., v. Falwell, 108 S.Ct. 876 (1988).

CONCLUSION 28

APPENDIX

Opinion Of The Court Of Appeals For The Ninth Circuit A-1

Reproduction of Article ..... A-B

TABLE OF AUTHORITIES

Cases Page

Anderson v. Fisher Broadcasting Companies, Inc., 300 Ore. 452, 712 P.2d 803 (1986) 22

Beecher v. Montgomery Ward & Co., Inc., 517 P.2d 667, (Ore. App. 1973) 12

Bock v. Zittenfield, 672 P.2d 1237 (Ore. App. 1983) 12

Brown v. Darcy, 783 F.2d 1389 (9th Cir. 1986) 12

Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976) 13

Capra v. Thoroughbred Racing Association of North America, Inc., 787 F.2d 463 (9th Cir. 1986) 22

Church of Scientology of California v. Flynn, 744 F.2d 694 (9th Cir. 1984). 12,13,14

Conley v. Gibson, 355 U.S. 41, 45-46 (1957) 24

Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749 (1085) 26

Gertz v. Welch, 418 U.S. 323
(1974) 10,11,12,13,14,15,16

Greenbelt Cooperative Publishing
Association, Inc., v. Bressler, 398 U.S. 6
(1970) 15

Herceg v. Hustler Magazine, Inc., 814 F.2d
1017, 1028 (5th Cir. 1987) 26

Hinish v. Meier & Frank Co., 166 Ore. 482,
113 P.2d 438 (1941) 22

Humphers v. First Interstate Bank,
68 Ore. App. 573, 684 P.2d 581, 588
(1984) 24

Hustler Magazine, Inc., v. Falwell,
108, S.Ct. 876 (1988). 10,18,19,20,21

Information Control Corporation v.
Genesis One Computer Corporation,
611 F.2d 781 (9th Cir. 1980) 14

Kelly v. Schmidberger, 806 F.2d 44
(2d Cir. 1986) 13,16

King v. Menolascino, 276 Ore. 501,
555 P.2d 442 (1976). 12

Koch v. Goldway, 817 F.2d 507,
(9th Cir. 1987) 14

Letter Carriers v. Austin, 418 U.S. 264 (1974) 15,16

Lewis v. Time Incorporated, 710 F.2d 549 (9th Cir. 1983) 14

Mr. Chow of New York v. Ste. Jour Azur, S.A.,739 F.2d 219 2d Cir. 1985) 16

New York Times v. Sullivan, 376 U.S. 254 (1964) 20

Tollefson v. Price, 430 P.2d 990 (Ore. 1967) 22

Virgil v. Time, Inc., 527 F.2d 1122 (9th Cir. 1975), cert. den. 425 U.S. 998 21,22,23,25

Yagman v. Baden, 796 F.2d 1165, (9th Cir. 1986) 14

Statutes

28 U.S.C. Section 1254(1) 2

28 U.S.C. Sections 1331(a) and 1441(a) 3

Other Authorities

Restatement, Second, Torts, Sec. 652D . . . 23

United States Constitution,
First Amendment 2

United States Constitution,
FourteenthAmendment 2

No. . . . . ., Misc.

IN THE
SUPREME COURT of the UNITED STATES

October Term, 1988

PEGGY AULT,

Petitioner,

v.

HUSTLER MAGAZINE INC., et al.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner Peggy Ault respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit filed in this proceeding on October 25, 1988. That decision affords constitutional protection to defamatory speech to an extent beyond the scope of protection intended by the Constitution or this Honorable Court.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reproduced and attached in full as Appendix A.

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was filed October 25, 1988. No petition for rehearing or other proceedings were instituted. This Petition for a Writ of Certiorari is filed within ninety (90) days of October 25, 1988. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The applicable constitutional provisions involved are the First Amendment[1] and the Fourteenth Amendment[2] to the United States Constitution.

---

[1]Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and petition the Government for a redress of grievances.

[2]Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunites of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The claims made by Peggy Ault in this matter all arose out of the publication of an article titled "Asshole of the Month: Peggy Ault," by *Hustler Magazine*. The article contained numerous defamatory references to Peggy Ault. Additionally, *Hustler* had obtained a photograph of Peggy Ault through false pretenses. *Hustler* superimposed her photo on to the rear end of a bent-over naked man as a heading for the article. A reproduction of the article is attached as Appendix B. Its text is stated in full in this Petition, *infra*.

Peggy Ault originally filed her action for libel, invasion of privacy, intentional infliction of emotional distress, and related claims in state court in Oregon. The case was removed to federal court. The federal district court took jurisdiction based on the removal petition and retained federal jurisdiction based on 28 U.S.C. Sections 1331(a) and 1441(a).

Peggy Ault was a private citizen who resided in a small town on the outskirts of Portland, Oregon. She opposed opening a store dealing in pornographic materials in her neighborhood.

For reasons yet unknown to Peggy Ault, her opposition to pornography caught the attention of Huster Magazine. Her efforts had been the subject of a newspaper article published in the local *Willamette Weekly*. But it shocked Peggy Ault that her activities became the subject of a nationally distributed pornographic publication such as *Hustler*.

Hustler had contacted Peggy Ault and learned that she did not desire further exposure for her activities. Under the guise of "Century City Research," the research department of *Hustler* telephoned Peggy Ault and sought a photograph and other information from her. Peggy Ault turned *Hustler* down.

Nevertheless, "Century City Research" obtained two photographs of Peggy Ault from Cathy Cheney, who had taken the photos for the *Willamette Weekly*. *Hustler* proceeded to publish its defamatory attack on Peggy Ault, accompanied by her photograph.

Under her picture, the article began its attack on Peggy Ault:

> Straight feminists and dyke feminists alike are shoving their tongues up the ass of their new master, Jerry Falwell, because they believe he'll help them make pornography go away. So it seems there wouldn't be much need for another wacko group to tackle the imagined evils of porn.
>
> Nevertheless, Peggy Ault - who probably wouldn't know a feminist or a dyke even if one pissed on her leg - took it upon herself to form Citizens in Action for Clackamas County (CIA) to go one-on-one with smut. And we took it upon ourselves to name her *HUSTLER*'s Asshole of the Month for April.
>
> Headquartered in Milwaukee, Oregon - a small town outside Portland - CIA and its offshoot, Citizens for Legislation Against Decadence (CLAD), exist for the express purpose of denying Oregonians their constitutional rights to view or read anything Ault and her self-styled censors deem pornographic. And Ault knows porn when she sees it.

Up to this point, except for identifying Peggy Ault as a member of a "wacko" group and calling her a "censor," the publication is relatively tame. However, in typical *Hustler* style, the article continued in a much more vindictive manner:

> Her imagination is so active, she can't turn around without being accosted by something she considers smutty. Would you believe that this tightassed housewife feels so threatened by sex that she removes underwear and lingerie ads from the daily newspaper before allowing her children to read it?
>
> Clearly she's the sort of person who'd go so far as to replace Oregon's nickname, the Beaver State, because of its sexual connotations. But rather than attempt to solve her problems by seeking professional help, this deluded busybody obviously decided that a better course of action would be to take her frustrations out on the entire state of Oregon.
>
> Here's how it happened: One day while reading the local paper (and can't you just *hear* her clit throbbing as she crumpled up those offending undies ads?), Ault saw an article announcing the opening of an adult-video store in her town. Normally, people who have no desire to view a porn film just don't rent one or buy one. Not Peggy. She was so outraged at the existence of a store specializing in X-rated fare that she and some of her pals picketed the establishment. Thus was born the community-oriented CIA. (Why do those initials sound so

menacing?)

In these words, *Hustler* personalized its attack on Peggy Ault herself, not just her opposition to pornography. She is referred to as "tightassed" and "threatened by sex," both of which are objective descriptions of character traits, not opinions of her social views. Twice more she is portrayed as mentally deficient, as a "deluded busybody" who should have sought "professional help."

The worst of *Hustler's* characterizations of Peggy Ault was its suggestion that she became sexually aroused by removing advertisements from the newspaper - "can't you just *hear* her clit throbbing as she crumpled up those offending undies ads?" This is *Hustler's* technique - to make the person it attacks into a pornographic object herself. This type of attack on Peggy Ault, taken with the remainder of the article, prompted the United States Court of Appeal for the Ninth Circuit to agree that a reasonable interpretation of the depiction in words and picture of Peggy Ault is that they were intended to make *Hustler*'s readers look at Peggy Ault in the same light that they look at the naked models in the magazine - as objects, unworthy of intellectual respect and worthy only of sexual contempt.[3]

The concluding paragraphs of the article continued the personal attack on Peggy Ault. They also continued her objectification:

---

[3]Opinion, Appendix A, pp. A-10, A-11.

When her intimidation tactics failed to force the store to close, she formed CLAD, a statewide organization for influencing legislators. Ault, you see, has big plans for Oregon - nothing less than altering the state constitution to allow her and her cronies to determine what is suitable for others to read or view.

Now, it's one thing to "supervise" what one's children read, but if Ault has her way, she would wipe out the first amendment rights of every adult who gets a charge out of x-rated films.

Although Ault's neighbors don't all appear to share her fanataticism ("We have a very apathetic community here," she confided to *HUSTLER's* sources), the forces of repression rarely give up. And Ault and her ilk have made it clear that they regard freedom of speech as a *privilege* to be awarded to a select few.

Well, we've got news for Peggy Ault: Freedom of speech is a *right* guaranteed to every American from pornographers on down to the basest money-grubbing, fear-mongering TV evangelists.

It's tempting to dismiss her as nothing more than a small-town crackpot, but we believe that anyone who wants to destroy the rights of others must be taken seriously - no matter how big an Asshole she is.

With these words, *Hustler* again characterized Peggy Ault as mentally deficient - referring to her "fanataticism" and to her as a "crackpot." And the suggestion that she would "confide" in *Hustler*'s sources, which she did not do except to turn down "Century City

Research's" request for information, was an untrue characterization of Peggy Ault.

The United States Court of Appeals for the Ninth Circuit found that the publication about Peggy Ault was defamatory. "First, although we agree with Ault that the words initially convey a defamatory meaning, when the facts of publication are considered the words assume the character of protected opinion."[4] (Emphasis added.) The Court reasoned that because of the nature of the publication where the attack appeared, *i.e.*, *Hustler Magazine*, the otherwise defamatory attack on Peggy Ault became constitutionally protected opinion. Peggy Ault was harmed by *Hustler's* "defamatory opinion," but without legal remedy.

The decision in the United States Court of Appeals for the Ninth Circuit culminated a long series of legal rulings adverse to Peggy Ault. As noted, Peggy Ault's original complaint had alleged libel, invasion of privacy, intentional infliction of emotional distress, and other related causes of action. The trial court, Hon. Helen J. Frye, dismissed all claims pursuant to various Rule 12 motions. The libel and intentional infliction of emotional distress claims were dismissed pursuant to the trial court's finding that the statute of limitations had run. Peggy Ault appealed this ruling. The United States Court of Appeals for the Ninth Circuit did not reach this issue because the Court ruled that its finding

---

[4]Id., p. A-7

that the article constituted protected opinion disposed of the matter.

The trial court also dismissed all of Peggy Ault's claims for invasion of privacy: specifically, claims for false light invasion of privacy, public disclosure of private facts, intrusion, and misappropriation of image. The United States Court of Appeals for the Ninth Circuit upheld the false light dismissal on the basis that the article constituted protected opinion.

With respect to public disclosure of private facts, the trial court had found that Oregon law required such a claim must plead allegations of the truthfulness of the facts so published. The United States Court of Appeals for the Ninth Circuit agreed, and added that the facts about Peggy Ault appeared to be public facts rather than private ones. The trial court did not give a reason for its dismissal of the intrusion claim. The United States Court of Appeals for the Ninth Circuit found that republication of the photograph (originally given to another photographer, with Peggy Ault's understanding that it would be used only for the local newspaper) was not an intrusion. The misappropriation findings of both the trial court and the United States Court of Appealsfor the United States Court of Appeals for the Ninth Circuit were to the effect that the article was "newsworthy" and that it was not published solely for the commercial benefit of *Hustler*. Peggy Ault also made related claims for trespass and conversion, but

these are not the subject of or germane to this Petition for Writ of Certiorari.

In its final decision, the trial court found that the article as a whole constituted protected opinion. This rationale, above all, formed the basis for much of the decision of the United States Court of Appeals for the Ninth. The finding that the article constitutes protected opinion is the primary focus of this Petition for Writ of Certiorari. The dismissal of the public disclosure of private facts, intrusion, and misappropriation are presented as further grounds for granting the writ.

REASONS FOR GRANTING THE WRIT

The decision below is an unjustified extension of Gertz v. Welch, 418 U.S. 323 (1974) and Hustler Magazine, Inc., v. Falwell, 108 S.Ct. 876 (1988).

The decision below affords undue constitutional protection to defamatory statements in claims for libel, intentional infliction of emotional distress, and false light invasion of privacy. Appeals courts have, over the years, seized on the *dicta* of Gertz that "there is no such thing as a false idea,"[5] to create an overly broad and unacceptably subjective category of constitutionally protected opinion. Review of the scope of protected opinion is sought.

---

[5]Gertz v. Welch, at 418 U.S. 339.

Overextension of the Concept of Opinion.

There are constitutional limits on the right to defame, as this Court has observed:

> However, the need to avoid self-censorship by the news media is, however, not the only societal value at issue. If it were, this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and undefendable immunity from liability for defamation. Yet absolute protection for the communications media requires a total sacrifice of the competing value served by the law of defamation. Gertz v. Welch, *supra*, at 418 U.S. 341.

The absolute right to defame does not exist, but the United States Court of Appeals for the Ninth Circuit has extended the concept of protected opinion beyond the scope contemplated by the First Amendment and Gertz, *supra*. This is particularly true when, as in this case, the United States Court of Appeals for the Ninth Circuit allows the "context" of the publication, to wit, a pornographic magazine, to control the determination of whether defamatory statements are protected opinion.

It is critical to note the result in Gertz - a private citizen was allowed to pursue a claim for libel despite of claims by the defendants that their defamatory statements were constitutionally privileged. Justice Powell also pointed out that "there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and

wide-open' debate on public issues." Gertz, *supra*, at 418 U.S. 340.

The words used to attack Peggy Ault, even to be an opinion, must express an idea. What idea is expressed? What public debate is furthered by this type of assault on her personal dignity? None. Elevation of such conduct to the pedestal of protected speech should not be tolerated.

The Ault decision legitimizes a category of defamation, defamatory opinion, to an extent which should be constitutionally unacceptable. The words and depiction of Peggy Ault are clearly defamatory. "We agree with Ault that the words initially convey a defamatory meaning. . ." United States Court of Appeal for the Ninth Circuit opinion, Appendix A, p. A-7. The words are capable of a defamatory meaning and meet the test of both Oregon state law and Ninth Circuit decisions in this regard. They constitute libel, *per se*. See, e.g., Beecher v. Montgomery Ward & Co., Inc., 517 P.2d 667, (Ore. App. 1973); King v. Menolascino, 276 Ore. 501, 555 P.2d 442 (1976); Bock v. Zittenfield, 672 P.2d 1237 (Ore. App. 1983); Church of Scientology of California v. Flynn, 744 F.2d 694 (9th Cir. 1984); and Brown v. Darcy, 783 F.2d 1389 (9th Cir. 1986).

But the United States Court of Appeals for the Ninth Circuit (and other circuits) have extended the concept of opinion well beyond Gertz, and instituted tests which defy an objective, uniform application. Gertz did not authorize the type of attack which was

levied against Peggy Ault. Gertz did not contemplate a convoluted test of what is opinion. Gertz did not contemplate the illogical results which deny Peggy Ault a remedy but allow a church group to prevail against a man who merely suggested that someone may have tried to kill him (Church of Scientology, *supra*). Gertz did not anticipate that William F. Buckley should prevail against a man who inferred that Buckley may have libelled others, Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976), while leaving Peggy Ault totally without a remedy. Gertz did not intend that a statement by a president of a priestly society which suggested that some members had placed church property in their own names would not be classified as opinion, Kelly v. Schmidberger, 806 F.2d 44 (2d Cir. 1986), while the vile attack on Peggy Ault by *Hustler* would be.

The United States Court of Appeals for the Ninth Circuit test for what is or is not a constitutionally protected opinion, as stated by the Court in Peggy Ault's case, is:

> 1. Whether the words can be understood in a defamatory sense in light of the facts surrounding the publication, including the medium by which, and the audience to which, the statement is disseminated;
>
> 2. Whether the context in which the statements were made, e.g., public debate or a labor dispute, would lead the audience to anticipate persuasive speech such as "epithets, fiery rhetoric or hyperbole;" and

> 3. Whether the language used is the kind generated in a "spirited legal dispute." Opinion, Appendix A, p. A-7.

This test, in the Ninth Circuit, is the product of a line of cases composed of Information Control Corporation v. Genesis One Computer Corporation, 611 F.2d 781 (9th Cir. 1980); Lewis v. Time Incorporated, 710 F.2d 549 (9th Cir. 1983); Church of Scientology of California v. Flynn, *supra*; Yagman v. Baden, 796 F.2d 1165, (9th Cir. 1986); and Koch v. Goldway, 817 F.2d 507, (9th Cir. 1987).

There are two primary problems with the test of the United States Court of Appeals for the Ninth Circuit for what is constitutionally protected opinion. The first is that, well beyond the scope and intention of Gertz, it looks to the context of the publication as a controlling factor. In Peggy Ault's case, the Court found that the placement of the attack in *Hustler Magazine* immunized words which were otherwise defamatory. What if the same words about Peggy Ault had been in *Time Magazine* or *The New York Times?* Under the United States Court of Appeals for the Ninth Circuit resolution of Peggy Ault's case, since the readership of such legitimate publications might not ordinarily expect to see such vituperative attacks, Peggy Ault should prevail. *Time Magazine* or t*The New York Times* would not be entitled to claim that the same words about Peggy Ault were protected opinion.

The words were just as hurtful to Peggy Ault's reputation regardless of whether they were printed in

Hustler or in *Time*. The attack was just as damaging to Peggy Ault emotionally no matter where it was printed. Peggy Ault's pain deserves protection.

This emphasis on the context of where the words are printed springs from a misapplication of Gertz, *supra*, coupled with this Court's decision in Letter Carriers v. Austin, 418 U.S. 264 (1974).[6] In Letter Carriers, in addition to first amendment considerations, there were provisions of the Labor Management Relations Act which encouraged free debate on issues dividing labor and management. This Court gave additional emphasis to protect speech in the heated context of labor disputes, based on the First Amendment and the Labor Management Relations Act. Unfortunately, the United States Court of Appeals for the Ninth Circuit has extended this approach to include a context feature of the test for constitutionally protected opinion beyond the scope of Gertz, Letter Carriers, and Greenbelt Publishing. It is for this reason that Peggy Ault adamantly argued, and continues to

---

[6] One other U.S. Supreme Court decision, Greenbelt Cooperative Publishing Association, Inc., v. Bressler, 398 U.S. 6 (1970), is commonly cited by the appeals courts in their discussions of what is constitutionally protected opinion. It involved newspaper coverage of a city council meeting at which some citizens characterized the negotiating position of an applicant for a zoning variance as "blackmail." It is from this decision that courts have allowed "rhetorical hyperbole" and the "vigorous epithet" in a "heated public debate" to qualify as protected opinion. Peggy Ault asserts that the nature of Hustler's assault on her is of a completely different character and degree.

maintain, that a deliberate, calculated attack on her which was the product of a lengthy editorial process is not entitled to the same "contextual" considerations as name-calling at a city council confrontation. The rejection by the United States Court of Appeals for the Ninth Circuit of Ault's arguments in this regard[7] is an overextension of the concepts embodied in decisions from this Court.

The second principal problem with the United States Court of Appeals for the Ninth Circuit test for what is constitutionally protected opinion is that the Ninth Circuit is inconsistent with other circuits. A discussion of the rule in the Second Circuit illustrates that point. Both Mr. Chow of New York v. Ste. Jour Azur, S.A., 739 F.2d 219 (2d Cir. 1985), and Kelly v. Schmidberger, *supra*, at 806 F.2d 47, outline the test as follows:

> 1. Examine both the context in which the statements are made and the circumstances surrounding the statements.
>
> 2. Look at the language itself to determine if it is used in a precise, literal manner or in a loose, figurative or hyperbolic sense.
>
> 3. Examine the statements to determine if they are objectively capable of being proved true or false. (If so, it is not opinion.)
>
> 4. Even if the above analysis indicates that the statement is opinion, determine if it implies

---

[7] "We must reject Ault's effort to limit the meaning of 'public debate' to an oral, contemporaneous exchange of ideas." Opinion, Appendix A, p. A-8.

the allegation of undisclosed defamatory facts as the basis for the opinion. (If so, it is not opinion.)

Parts 1 and 2 of the United States Court of Appeals for the Second Circuit test resemble aspects of the United States Court of Appeals for the Ninth Circuit test for opinion. However, parts 3 and 4 of the United States Court of Appeals for the Second Circuit test differ radically, and in ways which might have made a difference if they were applied to the statements about Peggy Ault.

If a statement objectively provable as true or false cannot be an opinion, then many of the statements made about Peggy Ault should be considered as false statements of fact rather than protected opinion. It is objectively demonstrable that Peggy Ault (not her ideas about pornography) is not crazy, psychotic, or otherwise clinically mentally deficient. It is objectively provable that she is not sexually aroused ("can't you just *hear* her clit throbbing") by reading a newspaper or cutting advertisements from it. It is objectively provable that she does not feel "threatened by sex." It is objectively provable that she did not "confide" in *Huslter's* sources. Under this test, Peggy Ault would have prevailed.

Falwell Should Not Control The Opinion Analysis; The Protections Afforded Under Falwell Are Sufficient Without a Blanket Extension of Opinion Protection To Claims For Intentional Infliction Of Emotional Distress

The United States Court of Appeals for the Ninth Circuit relied strongly on the recent decision of this

Court in Hustler v. Falwell, *supra*. In rejecting Peggy Ault's claims, the United States Court of Appeals for the Ninth Circuit observed as follows: (Opinion, Appendix A, pp. A-5 and A-6)

> Nor can privileged opinion support a claim for intentional infliction of emotional distress. Hustler Magazine, Inc., v. Falwell, 108 S.Ct. 876 (1988). Falwell holds "that public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement fact which was made with 'actual malice,' *i.e.*, with knowledge that the statement was false or with reckless disregard as to whether or not it was true." *Id.* at 882.

The primary distinguishing factor between Peggy Ault's case and the Falwell case is that there was a specific jury finding that the publication about the Rev. Falwell made no false statement of fact about him. To the jury and to the courts, the Falwell publication was parody--and the publication explicitly stated this. But there has been no jury finding that there was no false statement of fact about Peggy Ault. On the contrary, the United States Court of Appeals for the Ninth Circuit observed that the words "initially convey a defamatory meaning. . ." (Opinion, Appendix A, p. A-7.) Thus, the words "initially" are false statements of fact about Peggy Ault - but they somehow are magically converted to protected opinion by virtue of their

placement in *Hustler Magazine*. This is in spite of the fact that, unlike Falwell, the "Asshole of the Month" publication about Peggy Ault did nothing to identify itself as opinion or editorial. It appeared as a report by the editors of *Hustler* that Peggy Ault was, based on facts known to them, a figure of contempt, a sexual object subject to sexual arousal from underwear ads in the newspaper, and certifiably mentally ill.

It is true that Falwell, *supra*, requires a false statement of fact. Peggy Ault alleged that there were false statements of fact about her. The appellate court found the words "initially defamatory." For a claim of intentional infliction of emotional distress, this should be sufficient--coupled with the actual malice requirement.

Even if all the statements about Peggy Ault would be construed as opinion, they should be judged sufficient for a claim of intentional infliction of emotional distress. To this extent, Peggy Ault seeks clarification or a review of the result in Falwell, *supra*.

The requirement that a public figure prove actual malice in a claim for intentional infliction of emotional distress is sufficient protection for the "breathing space" for free expression which Hustler Magazine, Inc., v. Falwell, *supra*, establishes. It is enough of a burden for a plaintiff, like Peggy Ault, to

prove such actual malice.[8] And requiring proof of actual malice in an intentional infliction of emotional distress case is precisely the protection which this Court has endeavored to offer publishers in New York Times v. Sullivan, 376 U.S. 254 (1964), and its progeny.

In the context of an intentional infliction of emotional injury claim, the gravamen of the claim is a direct injury to the person's emotional status. Falwell recognizes this, and recognizes the interest of the state and individuals to protect people from unjustified assaults. "Generally speaking the law does not regard the intent to inflict emotional distress as one which should receive much solicitude, and it is quite understandable that most if not all jurisdictions have chosen to make it civilly culpable where the conduct in question is sufficiently 'outrageous.'" Hustler Magazine, Inc., v. Falwell, *supra,* at 108 S.Ct. 880.

A defamatory statement, whether it is a libel or an opinion, can hurt an individual. Extension of the cloak of Falwell to immunize all purported statements of opinion from claims for intentional infliction of

---

[8] Peggy Ault has never admitted that she is a public figure. The trial court ruled that she was a public figure for issues related to the pornography controversy. The Ninth Circuit decided that it was not critical to categorize her either as a private person or a public figure, given its finding that the publications were protected opinion. "Thus we conclude that the opinion privilege bars recovery for intentional infliction of emotional distress whether Ault is a public figure or a private person for first amendment purposes and do not decide her status." Opinion, Appendix A, p. A-6.

emotional distress gives the publisher unfettered power to hurt and leaves the victim without remedy. The requirement of proof of actual malice is sufficient protection for the publisher and it need not be supplemented with convoluted, inconsistent extensions of the doctrine of protected opinion.

The Court Should Review the Dismissal of Peggy Ault's Other Claims for Invasion of Privacy

Public Disclosure of Private Facts

Both the trial court and the United States Court of Appeals for the Ninth Circuit rejected Peggy Ault's claims that *Hustler's* treatment of her image and *Hustler's* statements about her amounted to a public disclosure of private facts. The trial court's reasoning was based on a purported failure of Peggy Ault to allege that any of the facts stated about her were true. The appeals court agreed and added that the publication must be of private, not public facts. In doing so, the United States Court of Appeals for the Ninth Circuit erroneously interpreted Oregon substantive law and ignored its own decision in Virgil v. Time, Inc., 527 F.2d 1122 (9th Cir. 1975), *cert. den.* 425 U.S. 998.

The presentation of Peggy Ault's picture in the naked rear end of a bent over man was a public disclosure of her image to which she did not consent. It was a humiliating presentation of her real image. Although Peggy Ault had consented to the use of her photograph by her local paper, the *Willamette Weekly*,

she believed that her photograph would be used solely for that paper. These matters were pled and called to the attention of the trial court. Peggy Ault's intent was to have her image as private as possible, with the single exception of a small town newspaper article about her.

A line of decisions in Oregon and the Ninth Circuit establishes a cause of action there for public disclosure of private facts. Hinish v. Meier & Frank Co., 166 Ore. 482, 113 P.2d 438 (1941); Tollefson v. Price, 430 P.2d 990 (Ore. 1967); Anderson v. Fisher Broadcasting Companies, Inc., 300 Ore. 452, 712 P.2d 803 (1986); and Capra v. Thouroughbred Racing Association of North America, Inc., 787 F.2d 463 (9th Cir. 1986). Both Anderson, *supra*, and Tollefson, *supra*, recognized that the words constituting the invasion of privacy need not be alleged as true. In Tollefson, the complaint specifically alleged that the statements in the publication were untrue. Anderson, at 712 P.2d 814, explicitly said that "the distressing report of presentation of a person's private affairs might not be truthful."

In Virgil v. Time, Inc., *supra*, the plaintiff had first disclosed much personal information about himself. He later had a change of heart and made it clear he did not want the information published. The United States Court of Appeals for the Ninth Circuit upheld his claims against *Time* for subsequent publication of the information--observing that Virgil's

cause of action most closely resembled a claim for public disclosure of private facts. The United States Court of Appeals for the Ninth Circuit allowed a withdrawal of Virgil's consent to make the information public: "If consent is withdrawn prior to the act of publicizing, the consequent publicity is without consent." Virgil, *supra*, at 527 F.2d 1127.

In Virgil, the United States Court of Appeals for the Ninth Circuit adopted the Restatement, Second, Torts, Section 652D description of the tort, which, among other things, does not require the allegation of truthful disclosures or the disclosure of purely private facts:

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for unreasonable invasion of his privacy if the matter publicized is of a kind which:
>
> (a) would be highly offensive to a reasonable person, and
>
> (b) is not of legitimate concern to the public.

To Peggy Ault, even her image was private. Otherwise, she would not have harbored the belief that its use would be limited. The best indication of this was her refusal to provide personal information to "Century City Research," *Hustler's* ruse research organization. The use of her image, coupled with the defamatory words against her, could be construed as highly offensive to a reasonable person, and was not of legitimate concern to the public.

Intrusion

Peggy Ault alleged that *Hustler* obtained a private photograph of her through illegal means and through fraudulent misrepresentation. An affidavit of the photographer/reporter, Cathy Cheney, established that *Hustler* had not truthfully represented itself when she provided the photographs of Peggy Ault to "Century City Research." Peggy Ault informed the trial court, in argument, that she would demonstrate her refusals to provide information to *Hustler* ("Century City Research") herself.

This Court has acknowledged that "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove not set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Oregon has implicitly recognized the Restatement, Second, Torts formulation of all the torts of invasion of privacy in Humphers v. First Interstate Bank, 68 Ore. App. 573, 684 P.2d 581, 588 (1984).

The Restatement version of Intrusion is:

> One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

Hustler's illegal and fraudulent conduct to obtain Peggy Ault's photograph was highly offensive to her. It should also be highly offensive to any other person

who believes that an essentially private person who explicitly refused to cooperate with *Hustler* ought to have a right not to have her picture show up in a nationally circulated pornographic magazine superimposed onto the naked rear end of a bent over man.

The justification of the appeallate court for disallowing the intrusion claim was that once Peggy Ault consented to her photograph in the local newspaper, it forever became public. "[W]hen a person agrees to be photographed for a newspaper, the photograph is not a private concern and its republication does not create ground for liability." Opinion, Appendix A. p. A-11. But this totally ignored Peggy Ault's contentions that the photograph was obtained illegally and fraudulently--as well as Peggy Ault's representations that she would prove she explicitly refused to give *Hustler* access to her photographic image. It also ignored the Ninth Circuit's own ruling in Virgil v. Time, Inc., *supra*, to the effect that an individual may, at any time, withdraw his consent for the public use of private information about him.

Misappropriation of Image

The United States Court of Appeals for the Ninth Circuit upheld the dismissal of Peggy Ault's claim for misappropriation of image on the basis that *Hustler's* use of her image was not solely for its commercial gain, but rather to accompany a newsworthy article about

her. Peggy Ault asserts that pornography such as *Hustler* should be treated strictly as commercial speech. The dissenting comments of Judge Edith H. Jones in Herceg v. Hustler Magazine, Inc., 814 F.2d 1017, 1028 (5th Cir. 1987) are particularly germane to this issue. Judge Jones was discussing the decision of this Court in Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749 (1085), in which it was recognized that commercial speech is not entitled to the same constitutional protection as other speech:

> Measured by this standard, both *Hustler* in general and "Orgasm of Death" in particular deserve limited only first amendment protection. *Hustler* is a profitable commercial enterprise trading on its prurient appeal to a small portion of the population. It deliberately borders on technical obscenity, which would be wholly unprotected, to achieve its purposes, and its appeal is not based on cognitive or intellectual appreciation. Because of the solely commercial and pandering nature of the magazine, neither *Hustler* nor any other pornographic publication is likely to be deterred by incidental state regulation. No sensitive first amendment genius is required to see that, as the Court concluded in Dun & Bradstreet, "[t]here is simply no credible argument that this type of [speech] requires special protection to insure that 'debate on public issues [will] be uninhibited, robust and wide-open. (Cites Dun & Bradstreet, *supra*.) Herceg v. Hustler Magazine, Inc., 814 F.2d 1017, 1028 (5th Cir. 1987)

Peggy Ault argued this concept to the United States Court of Appeals for the Ninth Circuit, which agreed in part. "While *Hustler's* objectives may well have commercial overtones. . ." Opinion, Appendix A, p. A-12. Peggy Ault pointed out that an attack on her was a commercial assault, since she (and other opponents of pornography) represented a threat to *Hustler's* circulation.

Hustler should not receive special treatment and a greater license to harm than other publications. As argued above, the magical transformation of the words about Peggy Ault--from defamation to protected opinion--by their placement in *Hustler* gives *Hustler* an unfair right to attack and preferred constitutional treatment compared to the legitimate press. Treatment of *Hustler* for what it is--which is commercial speech for the sole purpose of purveying its pornographic images of its models and its enemies--would give some strength to the injured person. It would also pierce the fiction that *Hustler* misappropriated Peggy Ault's image for anything other than a commercial purpose.

CONCLUSION

For the reasons above stated, Peggy Ault respectfully requests this Court to issue a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

G. L. Spence
Gary L. Shockey
SPENCE, MORIARITY & SCHUSTER
Counsel for Petitioner

APPENDIX - A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PEGGY AULT,

Plaintiff-Appellant,

v.

HUSTLER MAGAZINE, INC.; FLYNT DISTRIBUTING CO., INC.; FLYNT SUBSCRIPTION COMPANY, INC.; CITY OF ROSES NEWSPAPER CO.; WILLAMETTE WEEKLY; CATHY CHENEY,

Defendants-Appellees.

No. 87-3684

D.C. No. CV-86-381-FR

OPINION

Appeal from the United States District Court
for the District of Oregon
Helen J. Frye, District Judge, Presiding

Argued and Submitted
April 7, 1988—Pasadena, California

Filed October 25, 1988

Before: Thomas Tang, Betty B. Fletcher and Harry Pregerson, Circuit Judges.

Opinion by Judge Tang

SUMMARY

Torts

Affirming a judgment and reversing a judgment imposing sanctions and attorney's fees, the court held that a Hustler Magazine article about appellant's anti-pornography position was constitutionally protected opinion.

Appellant Peggy Ault appeals the district court's dismissal of her invasion of privacy, libel, intentional infliction of emotional distress, and trespass and conversion claims against appellee Hustler Magazine, Inc. arising from the magazine's depiction of her in its regular "Asshole of the Month" feature. Ault organized opposition to an adult video-store and lobbies the legislature to enact anti-pornography measures. When Hustler Magazine featured Ault as "Asshole of the Month," the article was accompanied by Ault's photograph superimposed over the rear-end of a bent-over naked man. The article also discussed Ault's anti-pornography activities and characterized her organization as a "wacko group" engaging in censorship. Ultimately, as a result of Ault's third amended complaint, the court imposed sanctions on Ault and her attorney for filing frivolous claims and awarded attorney fees to Hustler.

[1] If the challenged statement constitutes the expression of an opinion rather than fact, then under the first amendment it cannot give rise to a defamation claim. Nor can an opinion form the basis of a claim for invasion of privacy by placing a person in a false light. Nor can privileged opinion support a claim for intentional infliction of emotional distress. **[2]** A three-prong test is used to determine whether the substance of a publication is fact or opinion. **[3]** The article states an opinion. Publication in Hustler creates a context which robs the statements of defamatory meaning because the statements will be taken as statements of Hustler's opinion of Ault. Sec-

ond, there is a heated and spirited debate on pornography of which this article is a part, and in which epithets, fiery rhetoric and hyperbole are expected. Third, the offending phrases in the article are representative of the type of language generated in a dispute over such a subject. [4] The Hustler article about Ault is constitutionally protected opinion and as such forecloses Ault's claims. [5] Ault unsuccessfully alleged the public disclosure of any true private facts. [6] The district court properly dismissed the claim of intrusion because Ault did not allege any facts to support it. [7] The district court properly dismissed the claim of misappropriation because Hustler did not use the photograph for its own commercial gain, but to accompany a newsworthy article about Ault.

COUNSEL

Gary L. Shockey, Spence, Moriarity & Schuster, Jackson, Wyoming, for the plaintiff-appellant.

David O. Carson, Beverly Hills, California, for the defendants-appellees.

OPINION

TANG, Circuit Judge:

In this diversity action, Ault appeals the district court's dismissal of her invasion of privacy, libel, intentional infliction of emotional distress, and trespass and conversion claims against Hustler Magazine, Inc. arising from the magazine's depiction of her in its regular "Asshole of the Month" feature. Ault also appeals the court's dismissal of Larry Flynt and L.F.P., Inc. for lack of personal jurisdiction, and the award of sanctions against Ault and her attorney. We affirm in part and reverse in part.

BACKGROUND

Peggy Ault founded the Citizens in Action for Clackamas County, Oregon, headquartered in Milwaukie, Oregon, to organize opposition to an adult video-store. As a member of this organization, Ault has participated in picketing adult stores. She is apparently also involved in Citizens for Legislation Against Decadence through which she lobbies the legislature to enact anti-pornography measures. In recognition of her activities Ault was interviewed by the newspaper, Willamette Week, and her photograph accompanied the resulting article.

In its April 1985 issue, Hustler Magazine published an article featuring Peggy Ault as "Asshole of the Month." The article is accompanied by a small photograph of Ault superimposed over the rear-end of a bent-over naked man. The article discusses Ault's anti-pornography activities and characterizes her organization as a "wacko group" engaging in censorship and intimidation tactics with plans to undermine first amendment freedoms. The article portrays Ault as a "tightassed housewife," "frustrated," "threatened by sex," a "fanatic," a "crackpot" and a "deluded busybody" in need of "professional help."

Ault initially sued in state court and the Hustler defendants removed to federal court. The original complaint included claims for intentional infliction of emotional distress, invasion of privacy, libel, outrage, trespass, conversion, interference with first amendment rights, obscenity and joint and several liability. After Ault filed a second amended complaint correcting a clerical error (i.e., the inadvertent inclusion of claims from another complaint), the district court dismissed the claims for libel and intentional infliction of emotional distress as barred by the statute of limitations, and the claims for trespass and conversion for failure to state a claim. It dismissed defendants Larry Flynt and L.F.P., Inc. for lack of personal jurisdiction. In her third amended complaint Ault

re-alleged all four forms of invasion of privacy and the district court dismissed the complaint. The court also imposed sanctions on Ault and her attorney for filing frivolous claims and awarded attorney fees to Hustler for time spent responding to the erroneous first amended complaint.

The court entered a final judgment dismissing the action on March 9, 1987. Ault timely appeals challenging all rulings of the district court.

DISCUSSION

I. Libel, False Light, and Intentional Infliction of Emotional Distress

[1] As a threshold matter we must determine whether the Hustler article constitutes the expression of an opinion rather than of factual statements. The distinction is crucial because if a challenged statement is one of opinion rather than fact, then under the first amendment it cannot give rise to a defamation claim. *Greenbelt Cooperative Publishing Ass'n Inc. v. Bresler,* 398 U.S. 6, 14 (1970). Opinions are constitutionally privileged because, in the Supreme Court's oft-reiterated view, under the first amendment there is no such thing as a false idea. *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 339-40 (1974). We have explained that "[b]ecause a statement must be false to be actionable defamation, Restatement (Second) of Torts § 558(a)(1977), an opinion is simply not actionable defamation." *Lewis v. Time Inc.,* 710 F.2d 549, 553 (9th Cir. 1983). It is likewise clear that a constitutionally privileged statement of opinion cannot form the basis of a claim for invasion of privacy by placing a person in a false light. *Time, Inc. v. Hill,* 385 U.S. 374, 387-88 (1967). Nor can privileged opinion support a claim for intentional infliction of emotional distress. *Hustler Magazine, Inc. v. Falwell,* 108 S. Ct. 876 (1988). *Falwell* holds "that public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one

here at issue without showing in addition that the publication contains a false statement of fact which was made with 'actual malice,' *i.e.*, with knowledge that the statement was false or with reckless disregard as to whether or not it was true." *Id.* at 882.

Falwell clearly holds that the opinion privilege applies by barring an emotional distress action brought by a public figure. We have said that the privilege also applies by barring a defamation action brought by a private person. *Lewis*, 710 F.2d at 553.[1] Thus we conclude that the opinion privilege bars recovery for intentional infliction of emotional distress whether Ault is a public figure or a private person for first amendment purposes and we do not decide her status.

It is our usual practice to apply the constitutional defense of privileged opinion without first analyzing whether the statements in question are actionable under state law. *See Koch v. Goldway*, 817 F.2d 507, 508 (9th Cir. 1987) (indicating that California courts conflate common law principles and constitutional doctrine on the definition of opinion). It is well settled in this Circuit that the fact or opinion distinction in diversity cases is to be decided as a question of federal law. *Id.* at 509 (citing *Lewis*, 710 F.2d at 555). *Accord Fudge v. Penthouse Int'l, Ltd.*, 840 F.2d 1012, 1016 (1st Cir. 1988), *petition for cert. filed*, May 26, 1988; *Ollman v. Evans*, 750 F.2d 970, 978 (D.C. Cir. 1984)(en banc)(whether a printed statement is protected opinion or an unprotected factual assertion is a matter of law for the court), *cert. denied*, 471 U.S. 1127 (1985).

[2] In general "[s]tatements not themselves factual, and which do not suggest that a conclusion is being drawn from

[1]There is no independent cause of action for intentional infliction of emotional distress based on the very same acts which are insufficient to support an action for defamation. *Flynn v. Higham*, 149 Cal. App. 3d 677, 681, 197 Cal. Rptr. 145, 147 (1983).

facts not disclosed in the statement, are commonly statements of opinion, not fact." *Koch,* 817 F.2d at 509. The three-prong test of whether the substance of a publication is fact or opinion is: (1) whether the words can be understood in a defamatory sense in light of the facts surrounding the publication, including the medium by which and the audience to which the statement is disseminated; (2) whether the context in which the statements were made, *e.g.,* public debate or a labor dispute, would lead the audience to anticipate persuasive speech such as "epithets, fiery rhetoric or hyperbole"; and (3) whether the language used is the kind generated in a "spirited legal dispute." *Lewis,* 710 F.2d at 553 (citing *Information Control Corp. v. Genesis One Computer Corp.,* 611 F.2d 781, 783-84 (9th Cir. 1980)).

Ault argues that under this test: (1) it is clear that any reasonable person would infer a defamatory meaning in these words; (2) the article is not part of a public debate in which a participant can be excused for intemperate language; and (3) nothing in the language of the article gives any indication that this is an editorial or opinion piece.

[3] We agree with the district court's application of the test finding that the article states an opinion. First, although we agree with Ault that the words initially convey a defamatory meaning, when the facts of publication are considered the words assume the character of protected opinion. Publication in Hustler, a magazine known for its pornographic content and directed to an audience sympathetic to pornography, creates a context which robs the statements of defamatory meaning because the statements will be taken as statements of Hustler's opinion of Ault, not as facts about her personal reasons for opposing pornography. We are particularly persuaded to this view because the article appeared in a regular monthly feature routinely devoted to lampooning opponents of pornography and critics of Hustler Magazine. *See Fudge,* 840 F.2d at 1017 (certain genres of magazine features are so familiar to the audience that a reader reasonably knows they

express opinions not facts). Second, we must reject Ault's effort to limit the meaning of "public debate" to an oral, contemporaneous exchange of ideas. We think it is clear that there is a heated and spirited debate on pornography of which this article is a part, and in which epithets, fiery rhetoric and hyperbole are expected. Third, although it is true that the Hustler feature did not include a disclaimer overtly identifying it as opinion, this misses the point of the third prong of the test of opinion. The offending phrases in this article are, unfortunately, representative of the type of language generated in a dispute over such a subject. *See Koch*, 817 F.2d at 510 (It is unfortunate that the legal category of opinion must be used to describe a statement that is no more than "a vicious slur" but "[b]ase and malignant speech is not necessarily actionable.").

[4] Our holding that the Hustler article about Ault is constitutionally protected opinion forecloses her claims for libel, for invasion of privacy by placing her in a false light and for intentional infliction of emotional distress. We affirm the district court's dismissal of these claims on grounds other than those employed by the district court. *See Golden Nugget, Inc. v. American Stock Exchange, Inc.*, 828 F.2d 586, 590 (9th Cir. 1987)(we may affirm the judgment of the district court on any basis finding support in the record). For this reason we do not reach the court's rulings that the libel action is barred by the statute of limitations or that the intentional infliction of emotional distress claim must be dismissed because it is based on the same facts as the libel claim.

II. Other Tort Claims

A. *Public disclosure of private facts*

A dismissal for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) is a legal ruling reviewed de novo. *Church of Scientology v. Flynn*, 744 F.2d 694, 695 (9th Cir. 1984). "[A] complaint should not be dismissed for failure to state a claim

unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). All allegations in the complaint must be treated as true. *Flynn*, 744 F.2d at 696.

[5] Ault's claim of public disclosure of private facts is the only claim that survived the district court's October 20, 1986 dismissal. The district court ultimately dismissed this claim because Ault did not successfully allege the publication of any true private facts. We agree with the district court's finding. The factual statements about Ault's involvement in anti-pornography organizations are not statements of private facts, nor are the facts that Ault reads the newspaper and removes ads for lingerie before letting her children read the paper. In a claim for invasion of privacy by publication of facts, the facts disclosed must be private, not public. *Tollefson v. Price*, 247 Or. 398, 401, 430 P.2d 990, 992 (1967); *Trout v. Umatilla Co. School Dist.*, 77 Or. App. 95, 712 P.2d 814, 817 (1985), *review denied*, 300 Or. 704, 716 P.2d 758 (1986).

Ault argues that a true picture of her was published and that a true statement (that she reads the newspaper and cuts out certain ads) was linked with a false and derogatory inference that she was sexually aroused "as she crumpled up those offending undies ads" to create the impression that a private fact was being revealed. Further, Ault argues that the truth of the statements need not be pleaded under Oregon law, citing *Hinish v. Meier & Frank Co.*, 166 Or. 482, 113 P.2d 438 (1941), *Hamilton v. Crown Life Ins. Co.*, 246 Or. 1, 423 P.2d 771 (1967), *Tollefson v. Price*, 247 Or. 398, 430 P.2d 990 (1967), and *Anderson v. Fisher Broadcasting Co.*, 300 Or. 452, 712 P.2d 803 (1986). But, as *Anderson* clearly states, the earlier cases did not involve the truthful publicizing of private facts. 712 P.2d at 806. *Anderson* holds that in Oregon there is no common-law tort liability for truthful presentation of private facts unless the defendant's conduct in obtaining or pub-

lishing the information is wrongful in some other respect. *Id.* at 814.

Ault construes a portion of *Anderson* to hold that there is a cognizable claim for public disclosure of private facts and that such disclosure of "private affairs might not be truthful." *Id.* This is a misreading of *Anderson.* The Oregon Supreme Court held there is no recovery for truthful publication and then went on to enumerate the other types of wrongdoing that could lead to recovery for the emotional injury resulting from a publication. *Id.* As a final note it indicated that there could be recovery for publication of false information, as in *Hinish* or *Tollefson,* but these claims would not be denominated "public disclosure of private facts."

B. *Intrusion*

[6] The district court properly dismissed the claim of intrusion because Ault did not allege any facts to support it. Ault relies on Restatement (Second) Torts § 652B (1977), which says

> One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

See Trout, 77 Or. App. at 99, 712 P.2d at 817 (Oregon court cites this section as the law in Oregon).

Ault contends that the Hustler defendants intruded on her "by fraudulently misrepresenting who they were to get a non-public picture of her," and also by prying into her life and personal affairs. The depiction in the picture and words was intended to make "its readers look at Peggy Ault in the same light that they look at the naked models in the magazine - as objects, unworthy of intellectual respect and worthy only of

sexual contempt." While this may be a reasonable interpretation of the purpose of the article, the facts do not fit the elements of the tort of intrusion. The means Hustler used to obtain the photograph is not actionable as an intrusion into Ault's privacy because when a person agrees to be photographed for a newspaper, the photograph is not a private concern and its republication does not create ground for liability. *Brewer v. Hustler Magazine, Inc.*, 749 F.2d 527, 530 (9th Cir. 1984); *Gill v. Hearst Publishing Co.*, 40 Cal. 2d 224, 253 P.2d 441, 444-45 (1953).[2]

C. *Misappropriation*

[7] The district court properly dismissed the claim of misappropriation because Hustler did not use the photograph for its own commercial gain, but to accompany a newsworthy article about Ault. The tort of wrongful appropriation requires that the defendant appropriate the plaintiff's likeness to his own use or benefit. Restatement (Second) Torts § 652C. It has generally been held that this tort is "not applicable when a person's picture is used to illustrate a noncommercial, newsworthy article." *Martinez v. Democrat-Herald Pub. Co.*, 64 Or. App. 690, 693, 669 P.2d 818, 820, *review denied*, 296 Or. 120, 672 P.2d 1193 (1983); *also see Anderson*, 300 Or. 452, 712 P.2d at 813 ("Publication of . . . [a] photograph is not appropriation for commercial use simply because the medium itself is operated for profit.") *Anderson* holds that using a picture without consent is actionable only when it injures the economic interests of the plaintiff due to commercial exploitation, or when the "picture was either obtained or broadcast in a manner or for a purpose wrongful beyond the unconsented publication itself." 712 P.2d at 813.

[2]It makes no difference to this analysis that the photo Hustler used was not the same one used by the Willamette Week, since both photos were in the photographer's possession and were very similar.

Ault argues that there is a commercial purpose here because Hustler wants to destroy the anti-pornography movement to enhance its profits, and lampooning Ault is one means to that end. While Hustler's objectives may well have commercial undertones, the article, as an expression of constitutionally protected opinion on a matter of public interest, is "newsworthy."

D. *Trespass and Conversion*

The district court properly found that Ault failed to state a claim for trespass upon her personal right to her photograph or for conversion of her personal property right in her photographic image. Trespass is an invasion of a possessor's interest in land. *Frady v. Portland General Elec. Co.*, 55 Or. App. 344, 637 P.2d 1345, 1349 (1981). Conversion requires the intentional exercise of dominion and control over a chattel. *B & L Furniture Co. v. Transamerica Ins. Co.*, 257 Or. 548, 480 P.2d 711, 712 (1971). While the photograph might be viewed as a chattel, it was the property of the photographer, not of Ault, so there was no conversion of Ault's chattels.[3]

III. Sanctions

Awards of sanctions and attorney fees are reviewed for an abuse of discretion. *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 828 (9th Cir. 1986); *Beaudry Motor Co. v. ABKO Properties, Inc.*, 780 F.2d 751, 756 (9th Cir. 1986), *cert. denied*, 107 S. Ct. 100 (1986). However, the legal conclusion that facts constitute a violation of Rule 11 is reviewed de novo. *Zaldivar*, 780 F.2d at 828.

The district court awarded Rule 11 sanctions based on Ault's allegedly frivolous claims of (1) interference with con-

[3]Because we find the district court properly dismissed all of Ault's claims, we need not consider the issue of the court's personal jurisdiction over Larry Flynt.

stitutional rights; (2) a civil claim based upon violation of obscenity statutes; and (3) joint and several liability against a local distributor. Ault argues that all of these liability theories were legally reasonable.

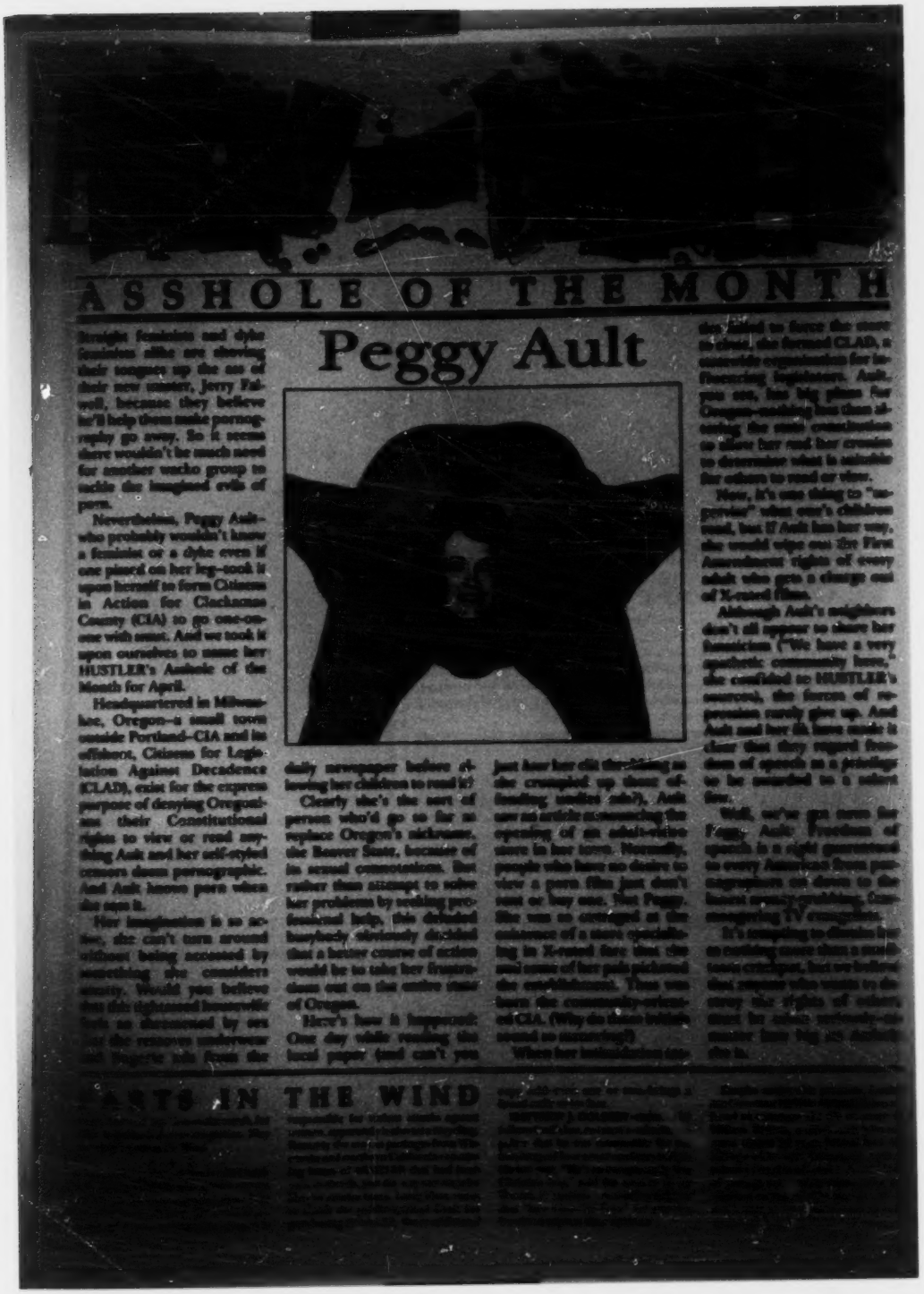
Under the standards of *Zaldivar*, 780 F.2d at 828, *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1542 (9th Cir. 1986), and *Hurd v. Ralphs Grocery Co.*, 824 F.2d 806 (9th Cir. 1987) we do not agree that sanctions are appropriate for the filing of these claims. Although counsel failed to defend these claims in the memorandum filed in response to Hustler's motion to dismiss, the inquiry into the propriety of Rule 11 sanctions for filing frivolous claims is whether a reasonably competent attorney would believe at the time of the filing that the plaintiff had a legal right under "existing law" or a "good faith argument for the extension, modification, or reversal of existing law." *Zaldivar*, 780 F.2d at 830. The failure to cite authority for certain claims is not dispositive of whether the claims had a legal foundation. In a case of this sort, where the plaintiff has clearly suffered a grievous assault to her human dignity we do not wish to endorse sanctions which can only serve to chill zealous advocacy. *See Hurd*, 824 F.2d at 810-11. That the law does not offer protection from such disgusting and distasteful abuse is not to say that arguments for its extension are wholly unreasonable. *Id.* at 811.

The court also imposed Rule 11 sanctions because Ault's counsel filed an erroneous First Amended Complaint without reading it. Although we do not condone carelessness, the error was clearly clerical in nature, resulting from a wrong signal to a word-processer that caused extraneous material to be included in the First Amended Complaint. We do not think it the type of error for which Rule 11 sanctions were intended. The Hustler attorneys could have avoided expending time answering the complaint and preparing a motion to dismiss if they had simply notified Ault's counsel of the obvious error.

CONCLUSION

The dismissal of the claims is **AFFIRMED** and the imposition of sanctions and attorney fees is **REVERSED**.

APPENDIX - B



ASSHOLE OF THE MONTH

Peggy Ault

straight feminists and dyke feminists alike are showing their support up the ass of their new master, Jerry Falwell, because they believe he'll help them make pornography go away. So it seems there wouldn't be much need for another wacko group to tackle the imagined evils of porn.

Nevertheless, Peggy Ault—who probably wouldn't know a feminist or a dyke even if one pinned on her leg—took it upon herself to form Citizens in Action for Clackamas County (CIA) to go one-on-one with smut. And we took it upon ourselves to name her HUSTLER's Asshole of the Month for April.

Headquartered in Milwaukie, Oregon—a small town outside Portland—CIA and its offshoot, Citizens for Legislation Against Decadence (CLAD), exist for the express purpose of denying Oregonians their Constitutional rights to view or read anything Ault and her self-styled censors deem pornographic. And Ault knows porn when she sees it.

Her imagination is so active, she can't turn around without being accosted by something she considers smutty. Would you believe that this right-wound housewife feels so threatened by sex that she removes underwear and lingerie ads from the daily newspaper before allowing her children to read it?

Clearly she's the sort of person who'd go so far as replace Oregon's nickname, the Beaver State, because of its sexual connotations. But rather than attempt to solve her problems by seeking professional help, the deluded busybody obviously decided that a better course of action would be to take her fingers-down out on the entire state of Oregon.

Here's how it happened: One day while reading the local paper (and can't you just hear her clit throbbing as she cramped up about offending useless zits?), Ault saw an article announcing the opening of an adult-video store in her town. Normally, people who have no desire to view a porn film just don't rent or buy one. Not Peggy. She was so outraged at the existence of a store specializing in X-rated fare that the real cause of her pale pickered the establishment. Thus was born the community-activist CIA. (Why do these bitches sound so annoying?)

Where her intimidation tactics failed to force the store to close, she formed CLAD, a nonviable organization for influencing legislators. Auit, you see, has big plans for Oregon—nothing less than altering the state constitution to allow her and her cronies to determine what is suitable for others to read or view.

Now, it's one thing to "supervise" what one's children read, but if Ault has her way, she would wipe out the First Amendment rights of every adult who gets a charge out of X-rated films.

Although Ault's neighbors don't all appear to share her fanaticism ("We have a very apathetic community here," she confided to HUSTLER's research), the forces of repression rarely give up. And Ault and her ilk have made it clear that they regard freedom of speech as a privilege to be awarded to a select few.

Well, we've got news for Peggy Ault: Freedom of speech is a right guaranteed to every American from pornographers on down to the lowest soap-peddling, Communist-supporting TV evangelists.

It's tempting to dismiss her as nothing more than a small-town crackpot, but we believe that anyone who wants to destroy the rights of others must be taken seriously—no matter how big an asshole she is.

ASSETS IN THE WIND

(2)

No. 88-1215

Supreme Court, U.S.
FILED
FEB 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1988

PEGGY AULT,

Petitioner,

vs.

HUSTLER MAGAZINE, INC., A California corporation; LARRY FLYNT, a citizen of California; FLYNT DISTRIBUTING COMPANY, INC., a California corporation; FLYNT SUBSCRIPTION COMPANY, INC., a Nevada corporation; L.F.P., INC., a California corporation; BAY NEWS, INC., dba Fred N. Bay News Company, an Oregon corporation; BAY NEWS INC., an Oregon corporation,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

ALAN L. ISAACMAN*
DAVID O. CARSON
KIRK N. SULLIVAN
COOPER, EPSTEIN & HUREWITZ
345 North Maple Dr., Ste. 200
Beverly Hills, California 90210
(213) 278-1111

**Counsel of Record* — *Counsel for Respondents*

Publishing and Graphic Electronic Services, Inc. (PAGES) / (213) 474-7855

23 pp

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. Should this Court overrule the consensus of all the federal circuit courts of appeal, and of this court itself, that statements of opinion are constitutionally protected from suit for libel or intentional infliction of emotional distress?

2. Should this Court overrule the consensus of the federal circuit courts of appeal that whether a statement is a statement of fact or a statement of opinion is a question of law for the court to determine?

3. Should this Court overrule the consensus of the federal circuit courts of appeal that the test for whether a statement is a statement of opinion or a statement of fact is based upon the totality of the circumstances with special emphasis given to context?

4. Should this Court accept Petitioner's invitation to "clarify or review" its unanimous, year-old decision in *Hustler Magazine, Inc. v. Falwell*, _ U.S. _, 108 S.Ct. 876 (1988)?

5. Should this Court review the specific statements published by Respondents about Petitioner to determine whether the United States Court of Appeals for the Ninth Circuit incorrectly concluded that those statements were constitutionally protected statements of opinion?

6. Should this Court review the United States Court of Appeals for the Ninth Circuit's determination, as a matter of Oregon state law, that a statement of critical editorial opinion by Respondents about Petitioner did not state claims of unlawful intrusion, misappropriation of image, or public disclosure of private facts?

TABLE OF CONTENTS

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED i

Table of Authorities iii

I. STATEMENT OF THE CASE 2

II. REASONS FOR DENYING THE WRIT 3

1. The Opinion Defense Is Now Firmly Established As a Matter of Federal Constitutional Law 3

2. Vituperation Is Not Defamation 6

3. There Is No Conflict Between The Circuits With Respect To The Fact/ Opinion Test 8

4. Petitioner's Claims of Invasion of Privacy Present No Constitutional Issue Worthy Of Review 13

III. RESPONDENTS SHOULD BE AWARDED DAMAGES PURSUANT TO SUPREME COURT RULE 49.2 13

IV. CONCLUSION 15

TABLE OF AUTHORITIES

CASES

Action Repair Inc. v. American Broadcasting Co., 776 F.2d 143 (7th Cir. 1985) 4

Ault v. Hustler Magazine, Inc., 860 F.2d 877 (9th Cir. 1988) 14

Church of Scientology v. Cazares, 630 F.2d 1272 (5th Cir. 1981) 4

Curtis Publishing Co. v. Birdsong, 360 F.2d 344 (5th Cir. 1966) 7

Deupree v. Iliff, 860 F.2d 300 (8th Cir. 1988) 12

Dunn v. Gannett New York Newspapers, Inc., 833 F.2d 446 (3d Cir. 1987) 4

Dworkin v. Hustler Magazine, Inc., _ F.2d _, 1989 WL 3925, 1989 U.S. App. Lexis 565 (9th Cir., Jan. 24. 1989) 7,14

Dworkin v. L.F.P., Inc., slip op., Wyoming District Court, Eighth Judicial District, November 21, 1988 14

Fudge v. Penthouse, 840 F.2d 1012 (1st Cir.) cert. denied, 109 S.Ct. 65 (1988) 4

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 5,6,12

Greenbelt Cooperative Publishing Association v. Bresler, 398 U.S. 6 (1970) 6,7

Hatch v. Reliance Insurance Co., 474 U.S. 1048 (1986) 13

Hustler Magazine, Inc. v. Falwell, _ U.S. _, 108 S.Ct. 876 (1988) *passim*

Hyde v. Van Wormer, 474 U.S. 992 (1985) 13

Information Control v. Genesis One Computer Corp., 611 F.2d 781 (9th Cir. 1980) 9,10

Janklow v. Newsweek, 788 F.2d 1300 (8th Cir. 1986) (en banc), cert. denied, 479 U.S. 883, 107 S.Ct. 272 (1986) 4,11,12

Keller v. Miami Herald, 778 F.2d 711 (11th Cir. 1985) 5,11

Koch v. Goldway, 817 F.2d 507 (9th Cir. 1987) 4,12

Leidholdt v. L.F.P., Inc., 860 F.2d 890 (9th Cir. 1988) 14

Letter Carriers v. Austin, 418 U.S. 264 (1974) 4,5,6

Lewis v. Time, Inc., 710 F.2d 549 (9th Cir. 1983 5,9

Matter of Yagman, 796 F.2d 1165 (9th Cir. 1986), cert. denied, _ U.S. _, 108 S.Ct. 450 (1987) 4,5

Mr. Chow of New York v. Ste. Jour Azur S.A., 739 F.2d 219 (2d Cir. 1985) 4,5,9

Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984) (en banc), cert. denied, 471 U.S. 1127 (1985) 5,9-11

Orr v. Argus Press Co., 586 F.2d 1108 (6th Cir. 1978) cert. denied, 440 U.S. 960 (1979) 4,5

Potomac Valve and Fitting v. Crawford Fitting, 829 F.2d 1280 (4th Cir. 1987) 4,10,11

Rinsley v. Brandt, 700 F.2d 1304 (10th Cir. 1983) 4,5

Spence v. Flynt, slip op., Wyoming District Court, Eighth Judicial District, November 21, 1988 14

Tatum v. Regents of University of Nebraska, 462 U.S. 1117 (1983) 13

OTHER AUTHORITIES

Restatement (2d) of Torts, Section 558(a) (1977) 5

W. Prosser & W. Keeton, Handbook of the Law of Torts, § 111, at 776 (5th Ed. 1984) 7

No. 88-1215

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1988

PEGGY AULT,
Petitioner,

vs.

HUSTLER MAGAZINE, INC., et al.,
Respondents.

On Petition for a Writ of Certiorari
To The United States Court of Appeals
For the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents[1/] herein respectfully request that this Court deny the Petition for a Writ of Certiorari filed by Petitioner Peggy Ault to review the judgment and opinion

---

1/ The corporate Respondents herein are affiliated with each other. There are no other corporate affiliations required to be reported under Rule 18.1.

of the United States Court of Appeals for the Ninth Circuit[2/].

I.
STATEMENT OF THE CASE

Like its companion petition in *Leidholdt v. L.F.P., Inc., et al.*, No. 88-1214, this case does not present any constitutional issue deserving review. The statements published in *Hustler*, and about which Petitioner complains, were admittedly, harsh and vituperative criticism of Petitioner's public activities and the ideas which she has publicly espoused in her battle against magazines such as *Hustler*. However, nothing in the editorial column could be construed as a false assertion of fact about Petitioner. Rather, as the courts below correctly concluded, the column consisted entirely of statements of constitutionally protected opinion.

Indeed, as is evident from the editorial itself and from the opinion of the court below, the statements complained of were made in the context of a response by *Hustler* to Petitioner's public attacks on *Hustler* and other magazines she considers to be pornographic. Having taken an active role in the debate on pornography, Petitioner's suit complained that *Hustler* had joined in the debate by condemning her and her views.

Petitioner actually concedes that in order to achieve the relief she seeks, it will be necessary for this Court to "clarify or review" (i.e. overrule) its unanimous, year-old decision in *Hustler Magazine, Inc. v. Falwell*, __ U.S. __, 108 S.Ct. 876 (1988). *See* Petition for Writ of Certiorari at 19. In *Falwell*, this Court held that whether a public figure claims libel or intentional infliction of emotional distress, he or she "may not recover . . . without showing in addition that the publication contains a false statement of fact which

---

2/ This Brief in opposition is substantially identical to the Brief in opposition filed concurrently herewith by Respondents in the companion case of *Dorchen Leidholdt v. L.F.P., Inc., et al., No.88-1214*, just as Ault's Petition for a Writ of Certiorari is substantially identical to Leidholdt's. Essentially the only difference between the two Petitioners in these two cases is that Dorchen Leidholdt is an acknowledged public figure, while Petitioner Ault denies her public figure status.

was made with 'actual malice', i.e., with knowledge that the statement was false or with reckless disregard as to whether or not it was true." 108 S.Ct. at 882. Petitioner has offered no reason whatsoever, let alone any compelling reason, for this Court to reverse itself on this crucial question of First Amendment law.

Petitioner's real but unstated complaint is simply that she does not believe that Hustler, a magazine that she has devoted much time and energy to fighting, should be able to mention her name in a vituperative, critical way. It is now firmly established, however, as a matter of constitutional law that vituperative, pejorative or pernicious opinion is not actionable; indeed, the opinion defense is constitutionally mandated and is now firmly established as the law of all of the federal circuits. Petitioner's attempts to persuade this court to abandon this bedrock of constitutional libel doctrine should be rejected.

Unlike her compatriot in the companion case of *Leidholdt v. L.F.P., Inc.*, Petitioner does not admit her public figure status. In fact, she minimizes her actual role as a leader in the public campaign against pornography. Although the Court of Appeals below did not deem it necessary to determine whether Petitioner is in fact a public figure, the District Court concluded that by her own pleadings Ault had proved herself to be a public figure, having voluntarily and intentionally injected herself into the public controversy over pornography. As a public figure, Petitioner failed to plead that Respondents published false statements of *fact* about her. Moreover, the requirement of a false statement of fact applies even to claims by private figures.

II.
REASONS FOR DENYING THE WRIT

1. The Opinion Defense Is Now Firmly Established As A Matter Of Federal Constitutional Law.

Incredibly, Petitioner seeks to turn the pages of history back to the time when the opinion defense had yet to be recognized as mandated by the First Amendment in libel cases. Petitioner appears to suggest that the various circuit courts, in a number of opinions in this area, have

misread precedent and overstated the protection afforded to opinion in libel cases.

There is simply no reason for this Court to acquiesce to Petitioner's desire to repeal this well-settled doctrine. "It is by now well-settled that there exists a constitutional privilege for expressions of opinion." *Matter of Yagman*, 796 F.2d 1165, 1172 (9th Cir. 1986), cert. denied, _ U.S. _ , 108 S.Ct. 450 (1987). "The constitutional distinction between fact and opinion is now firmly established in the case law of the circuits." *Potomac Valve and Fitting v. Crawford Fitting*, 829 F.2d 1280 (4th Cir. 1987).

Indeed, this Court has established the opinion defense in its various rulings regarding the well-recognized requirement of a false statement of fact in order for there to be actionable defamation. *See, e.g., Letter Carriers v. Austin*, 418 U.S. 264, 283-284 (1974) ("Before the test of reckless or knowing falsity can be met, there must be a false statement of fact."); *Hustler v. Falwell, supra*, 108 S.Ct. 876 (1988) (Public figures may recover for libel or defamation only when they can prove both that the challenged statement was false and that the statement was made with the requisite level of culpability.); see also, *Koch v. Goldway*, 817 F.2d 507, 509 (9th Cir. 1987) (Kennedy, J.) ("Statements not themselves factual . . . are commonly statements of opinion, not fact.").

The opinion defense has now been specifically embraced by all of the federal circuits. *See, e.g., Fudge v. Penthouse*, 840 F.2d 1012 (1st Cir.) *cert. denied*, _ S.Ct. 65 (1988); *Mr. Chow of New York v. Ste. Jour Azur S.A.*, 759 F.2d 219 (2d Cir. 1985); *Dunn v. Gannett New York Newspapers, Inc.*, 833 F.2d 446 (3d Cir. 1987); *Potomac Valve and Fitting v. Crawford Fitting*, 829 F.2d 1280 (4th Cir. 1987); *Church of Scientology v. Cazares*, 630 F.2d 1272 (5th Cir. 1981); *Orr v. Argus Press Co.*, 586 F.2d 1108 (6th Cir. 1978) *cert. denied*, 440 U.S. 960 (1979); *Action Repair Inc. v. American Broadcasting Co.*, 776 F.2d 143 (7th Cir. 1985); *Janklow v. Newsweek*, 788 F.2d 1300 (8th Cir. 1986) (*en banc*), *cert. denied*, 479 U.S. 883, 107 S.Ct. 272 (1986); *Koch v. Goldway, supra*, 817 F.2d 507 (9th Cir. 1987); *Rinsley v. Brandt*, 700 F.2d 1304 (10th Cir. 1983); *Keller v. Miami Herald Pub. Co.*,

778 F.2d 711 (11th Cir. 1985); *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984) (*en banc*), *cert. denied*, 471 U.S. 1127 (1985).

Petitioner asks this Court to believe that each of the federal circuits' recognition of the opinion defense is based upon an unwarranted, even erroneous misreading of the "dicta" of *Gertz v. Robert Welch*, Inc., 418 U.S. 323 (1974) that "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for it correction no on the conscience of there is no such thing as a false idea" and that judges and juries are not to pass judgment on expressions of opinion. *Id.* at 339. However, statements of opinion have evolved into protected speech quite simply because, as noted by this Court in *Gertz*, an opinion simply cannot be false and actionable defamation requires the utterance of a false statement of fact. "Since an opinion is protected because it cannot be false and a statement is not actionable defamation unless it is false, 'an opinion is simply not actionable defamation.'" *Lewis v. Time, Inc.*, 710 F.2d 549, 553 (9th Cir. 1983) (citing Restatement (2d) of Torts, Section 558(a) (1977).

Moreover, Petitioner's attempt to distinguish *Hustler v. Falwell, supra*, on the ground that the *Falwell* case came to this Court along with a jury finding that there had been no statement of fact uttered about Reverend Falwell is unavailing. The determination of whether a challenged statement is one of fact or of opinion is a question of law for the court. *Matter of Yagman, 796 F.2d 1165, 1172 (9th Cir. 1986); Lewis v. Time, Inc., 710 F.2d 549, 553 (9th Cir. 1983); Rinsley v. Brandt, 700 F.2d 1304, 1309 (10th Cir. 1983); Orr v. Argus Press Co., 586 F.2d 1108, 1114 (6th Cir.), cert. denied, 440 U.S. 960 (1979); Mr. Chow of New York v. Ste. Jour Azur S.A., 759 F.2d 219 (2d Cir. 1985); see Letter Carriers v. Austin*, 418 U.S. 264 (1974) *(Reversing judgment because, as a matter of federal law, no factual representations could be inferred from challenged statements).* The fact that the district court in *Falwell* erroneously permitted the opinion defense to go to the jury does not mean that this Court's opinion in *Falwell* endorsed such a departure from the traditional constitutional roles of judges in determining whether a statement is opinion.

Petitioner also suggests (although apparently not very strongly) that because she does not admit her public figure status, she is not bound by the strictures against recovery based upon statements of opinion. The court of appeals, relying on its own precedent, correctly observed that the opinion privilege bars actions brought by private figures as well as public figures. The fact is that no court has held that the opinion privilege applies only to private figures, and the opinion privilege has frequently been successfully invoked against private figures. *See, e.g., Deupree v. Iliff*, 860 F.2d 300, 304-305 (8th Cir. 1988); *Ollman v. Evans, supra*, 750 F.2d at 975. *See also Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986)(private figure plaintiff must prove that false statements were made when statements relate to matters of public concern). Moreover, Ault's admitted leadership role in the public controversy over pornography clearly qualifies her for public figure status, as the district court correctly concluded.

2. Vituperation Is Not Defamation.

Petitioner asks this Court to view the statements complained of in this case as unprotected opinion without regard to the truth or falsity of the statements, but rather because they are vituperative and "pornographic", in the words of Petitioner. Such a view is neither warranted by the overriding First Amendment concerns which mandate the opinion defense nor by the facts of this case.

As a matter of constitutional law, vituperative, pejorative or pernicious opinion is not actionable. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 329 (1974), this Court stated:

> "Under the First Amendment there is no such thing as a false idea. *However pernicious an opinion may seem*, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." (Emphasis added.)

Indeed, as a longstanding matter of law, vituperation and insulting words have not been actionable. Rather, they have long been recognized as protected "rhetorical hyperbole." *See, e.g., Letter Carriers v. Austin*, 418 U.S. 264, (1974) ("scab", "traitor"); *Greenbelt Cooperative*

Publishing Association v. Bresler, 398 U.S. 6 (1970) ("blackmail"). *See also, Curtis Publishing Co. v. Birdsong*, 360 F.2d 344, 348 (5th Cir. 1966) ("bastard").

Petitioner's contention that *Letter Carriers* was a labor law decision with no precedent of value in the First Amendment context overlooks the fact that "the case explicitly applied First Amendment principles." *Dworkin v. Hustler Magazine, Inc.*, _F.2d _, 1989, WL 3925, 1989 U.S. App. Lexis 565, slip op. at 537 n.4 (9th Cir. Jan.24, 1989).

As Dean Prosser has stated, "A certain amount of vulgar name calling is tolerated, on the theory that it will necessarily be understood to amount to nothing more." W. Prosser & W. Keeton, *Handbook of the Law of Torts*, § 111, at 776 (5th Ed. 1984).

Most recently, this Court elaborated the protections which the First Amendment requires be given in cases such as this. *Hustler Magazine, Inc. v. Falwell*, _ U.S. _, 108 S.Ct. 876 (1988). In *Falwell*, the Court reaffirmed that it is immaterial whether a publication about a public figure is made with a bad motive or ill will, or that the publication is "outrageous" or offensive. The Court accepted the fact that the publication in question was "offensive to [Falwell], and doubtless gross and repugnant in the eyes of most." 108 S.Ct. at 879. But this Court rejected a rule which would permit recovery "for speech that is patently offensive and is intended to inflict emotional injury even when that speech could not reasonably have been interpreted as stating actual facts about the public figure involved." *Id.*

Such a rule was rejected because it would interfere with "the heart of the First Amendment" - "the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern" and "the freedom to speak one's mind." *Id.*

This Court noted that the sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical of public figures. *Id.*

> "Justice Frankfurter put it succinctly in *Baumgartner v. United States*, 322 U.S. 665, 673 - 674 (1944), when he said that 'one of the prerogatives of American citizenship is the right to criticize public men and measures.' Such

> criticism, inevitably, will not always be reasoned or moderate; public figures as well as public officials will be subject to 'vehement, caustic, and sometimes unpleasantly sharp attacks.' *New York Times, supra,* 376 U.S., at 270."

108 S.Ct. at 880.

Petitioner's attempt to cast the words used against her as statements which are "beyond the pale" ignores the longstanding and well-reasoned authority that caustic and vehement criticism is the price public figures must pay for their public figure status. Thus, even though the editorial in this case was likely offensive to Petitioner and perhaps even "gross and repugnant in the eyes of most", *Falwell, supra,* it is not unprotected opinion simply because it is vituperative and most it certainly does not justify this Court's reexamining and limiting the opinion defense.

3. There Is No Conflict Between The Circuits With Respect To The Fact/Opinion Test.

Petitioner asserts that there exists a conflict between the Ninth Circuit's test for determining whether a challenged statement is one of fact or of opinion and the tests employed by other circuits. In reality, however, any differences in the tests enunciated by these circuits amounts to nothing more than a difference in the words chosen to articulate the tests; indeed, both tests have as their common and most important denominator an analysis of the "totality of the circumstances" of the challenged statements with an emphasis on the context of the statements themselves.

Curiously, Petitioner asserts that the court below erred in applying its own test, rather than that of the Second Circuit, in determining whether the statements in this case were statements of fact or of opinion. Petitioner erroneously believes that choice of law principles require one federal circuit court of appeals to eschew its doctrine of when the plaintiff is a resident of the other circuit. Even if Petitioners were correct, however, the result would be the same because the tests for opinion are essentially identical in the Second and Ninth Circuits. The Court below applied the three-pronged test which it had first applied in *Information Control v. Genesis One Computer Corp.*, 611

F.2d 781 (9th Cir. 1980). Appendix A-6.[3/] That test requires examination of the language used, the context (i.e., the facts surrounding the publication), and whether the statement was made in circumstances in which the audience would anticipate efforts by the parties to persuade others to their position by use of epithets or hyperbole. *Information Control*, 611 F.2d at 783-784, *Lewis v. Time, Inc.*, 710 F.2d 549, 553 (9th Cir. 1983).

Petitioner concedes that the test enunciated by the Second Circuit in *Mr. Chow of New York v. Ste. Jour Azur S.A.*, 739 F.2d 219 (2nd Cir. 1985), like the Ninth Circuit test, places great emphasis on the context in which the challenged statements are made and the circumstances surrounding the making of those statements; however, she argues that the Second Circuit test is in conflict with the Ninth Circuit because it contains a separate analysis concerning whether or not the statements are objectively capable of being proved true or false.

The inclusion of this "verifiability" prong does not set the respective tests in conflict with one another; indeed, both tests require, as their dominant feature, an analysis of the context of the statements and the surrounding circumstances of publication. In particular, the Second Circuit test enunciated in *Mr. Chow* was adopted from the four part test enunciated by the D.C. Circuit in *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984) (*en banc*), *cert. denied*, 471 U.S. 1127 (1985). See *Mr. Chow*, *supra*, 759 F.2d at 226. *Ollman* noted, however, that none of the four factors was paramount, particularly that of verifiability. On the contrary, *Ollman* emphasized the context in which the statements appear and the language surrounding the challenged statements.

> "We do not, of course, suggest that the four factor analysis is to be undertaken in a rigid locked-step fashion. Thus, as will become evident below, a logical starting point in applying the fact-opinion analysis may be the broad social context or setting within which the defamatory statement appears (factor "four")

3/ References to the Appendix noted herein are references to the specific pages of the Appendix to the Petition for Writ of Certiorari.

> and the language surrounding the challenged statements (factor "three").

Ollman, supra, 750 F.2d at 980, footnote 17.

Indeed, *Ollman* cited approvingly to the Ninth Circuit test of *Information Control,* noting that:

> "The degree to which a statement is 'laden with factual content' or can be read to imply facts depends upon the article or column, taken as a whole, from which the statement is a part. [Citation omitted.] The language of the entire column may signal that a specific statement which, standing alone, would appear to be factual is in actuality a statement of opinion."

750 F.2d at 982.

Moreover, the Fourth Circuit Court of Appeals, which has adopted the *Ollman* four-prong test, has dismissed the verifiability prong which Petitioner contends creates a conflict in the respective tests when the other prongs of the test demonstrate that a challenged statement is one of opinion.

> "Even when a statement is subject to verification, however, it may still be protected if it can best be understood from its language and context to represent the personal view of the author or speaker who made it. [Footnote omitted.] Thus we reject the suggestion, advanced by the plaintiffs in this case, that any 'question of fact' which can be decided by a jury can be actionable as defamation. Such a test ignores the underlying purposes of the fact/opinion distinction, and would lead to results that could not be reconciled with the developing case law in other circuits." [Footnote omitted.]

Potomac Valve and Fitting v. Crawford Fitting, supra, 829 F.2d 1288. The *Potomac Valve* court went on to note:

> "We hold that a verifiable statement, a statement that has failed the second *Ollman* factor, nevertheless qualifies as an 'opinion' if it is clear from *any* of the three remaining *Ollman*

> factors, individually or in conjunction, that a reasonable reader or listener would recognize its weakly or substantiated or subjective character - and discount it accordingly." (Emphasis in original.)

Id.

This is precisely what the court below has done in this case. In examining the context of the entire editorial column, the court noted:

> ". . . Hustler is a magazine known for its pornographic content and is directed to an audience sympathetic to pornography, and that the 'Asshole of the Month' column is an especially frequent vehicle for Hustler's lampooning of its critics, all will telegraph to a reader that the article presents opinions, not allegations of fact."

Appendix A-7. The court went on to note that:

> "While Hustler's remarks were not uttered in a live public debate, it nevertheless is an active participant in an ongoing, heated debate on the subject. Readers of the article, recognizing that it concerns a public, vigorous opponent of pornography, will read Hustler's vituperation as exaggerated criticism of the views she holds."

Appendix A-8.

Indeed, a great majority of cases from the various circuits concerning the opinion defense base their analysis, in large part, on the "context" analysis of the challenged statements themselves as well as the "totality of the circumstances" surrounding publication which, as Petitioner concedes, are features common to both the Ninth and Second Circuit tests. See, e.g., *Koch v. Goldway*, 817 F.2d 507 (9th Cir. 1987); *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984); *Janklow v. Newsweek*, 788 F.2d 1300; *cert. denied*, 479 U.S. 883, 107 S.Ct. 272 (1986); *Keller v. Miami Herald*, 778 F.2d 711 (11th Cir. 1985); *Potomac Valve and Fitting v. Crawford Fitting, supra*, 829 F.2d 1280 (4th Cir. 1987).

Petitioner is therefore simply incorrect in arguing that if a statement appears objectively verifiable that statement must automatically be viewed as fact and not opinion. Even apparent factual statements must be allowed as opinion "when the surrounding circumstances of a statement are those of a heated political debate, or if certain remarks are necessarily understood as ridicule or vituperation, or both, but not as descriptive of factual matters." *Koch v. Goldway, supra*, 817 F.2d at 509. *See also, Janklow v. Newsweek, Inc., supra*, 788 F.2d 1300, 1302 (8th Cir. 1986).

Moreover, Petitioner's plea that certain of the statements made in the editorial are objectively verifiable is simply unavailing. Viewing the statements in context, as the court below correctly did, it is clear that Hustler was simply expressing its opinion that the kind of individuals who engage in the anti-pornography campaign and believe that "pornography" leads to rape and violence against women hold unfounded beliefs and are the type of women who are not liberated in the manner that Hustler advocates. In fact, it is precisely the point of *Gertz* that just as there is no such thing as a false idea, the judicial process is not available for proving whether one person's ideas are "founded" or "unfounded." Such disputes are to be resolved in the marketplace of ideas, not in the courts.

The statements which Petitioner contends are "verifiable" in this case all relate to Respondents' characterizations of Petitioner's belief and subjective state of mind. Such opinions are hardly verifiable, any more than the motives of a state prosecutor are verifiable. *See Janklow v. Newsweek, Inc.*, 788 F.2d 1300 (8th Cir. 1986); *Deupree v. Iliff*, 860 F.2d 300, 303-304 (8th Cir. 1988) (plaintiff's intrinsic, personal satisfaction in her job is not verifiable). Characterizations of one's state of mind are inherently unverifiable, depending as they must on the subject's own self-serving assertions as to what he or she actually believes or feels. Otherwise, a libel plaintiff could always defeat the opinion defense simply by asserting that the defendant's characterization of his or her beliefs is inaccurate, and that the only person who truly knows the plaintiff's beliefs is the plaintiff himself or herself.

Thus, while Petitioner would understandably like to construct some reviewable conflict between the circuits in the application of the opinion defense, the truth is that the circuits apply a uniform analysis in the determination of whether statements are fact or opinion and any differences are limited largely to the way in which that analysis is articulated. In this case, the court below applied the appropriate test and correctly concluded that the challenged statements were constitutionally protected opinion.

4. Petitioner's Claims of Invasion of Privacy Present No Constitutional Issue Worthy Of Review.

Petitioner asks this Court to review the decision of the court of appeals in dismissing her state law tort claims based upon three variants of invasion of privacy: misappropriation of image, intrusion and public disclosure of private facts. Petitioner's complaint is not of constitutional magnitude, nor does it present any federal question whatsoever. Rather, Petitioner simply contends that the court erroneously interpreted Oregon law and its own Ninth Circuit precedent.

Respondents submit that even if the these issues were worthy of consideration by this Court, the opinion of the court of appeals on these issues was correctly reasoned.

III.
RESPONDENTS SHOULD BE AWARDED DAMAGES PURSUANT TO SUPREME COURT RULE 49.2

Not only should the Court deny the petition for a writ of certiorari, but it should also award Respondents damages pursuant to Rule 49.2 of the rules of this Court. Rule 49.2 provides:

> When an appeal or petition for writ of certiorari is frivolous, the Court may award the appellee or the respondent appropriate damages.

This Court has not hesitated to impose such damages on Petitioners filing frivolous petitions for certiorari in appropriate cases. *See Hatch v. Reliance Insurance Co.*, 474 U.S. 1048 (1986); *Hyde v. Van Wormer*, 474 U.S. 992 (1985); *Tatum v. Regents of University of Nebraska*, 462 U.S. 1117 (1983).

The petition for a writ of certiorari in this case clearly qualifies as frivolous. In order to prevail, Petitioner must persuade this Court to overturn its unanimous, one year old decision in *Hustler Magazine, Inc. v. Falwell*, and in fact Petitioners ask this Court to do so. See Petition for Writ of Certiorari at 19, where Petitioner seeks "clarification or a review of the result in *Falwell, supra*."

Moreover, in order to prevail Petitioner must persuade this Court to reject the well-established protection, mandated by the First Amendment, granted to statements of opinion.

This is one of five similar lawsuits filed by the same attorneys on behalf of Petitioner and fellow anti-pornography activists against *Hustler* Magazine. The trial courts have dismissed each of these cases, either for failure to state a claim upon which relief can be granted or on a motion for summary judgment. *Leidholdt v. L.F.P., Inc.*, 860 F.2d 890 (9th Cir. 1988); *Ault v. Hustler Magazine, Inc.*, 860 F.2d 877 (9th Cir. 1988); *Dworkin v. Hustler Magazine, Inc.*, __ F.2d __, 1989 WL 3925, 1989 U.S. App. Lexis 565, (9th Cir., Jan. 24. 1989); *Spence v. Flynt*, slip op., Wyoming District Court, Eighth Judicial District, November 21, 1988; *Dworkin v. L.F.P., Inc.*, slip op., Wyoming District Court, Eighth Judicial District, November 21, 1988.

In *Dworkin v. Hustler Magazine, Inc.*, the Ninth Circuit served notice on plaintiffs such as Petitioner that in the future, sanctions may be appropriate when claims such as Petitioner's are pressed. Slip op. at 550. Respondents respectfully submit that this Court should serve notice on Petitioner and her attorneys, through an award pursuant to Rule 49.2, that such frivolous litigation will not be tolerated.

IV.
CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Dated: February 23, 1989

ALAN L. ISAACMAN*
DAVID O. CARSON
KIRK N. SULLIVAN
COOPER, EPSTEIN & HUREWITZ
A PROFESSIONAL CORPORATION
345 North Maple Drive
Suite 200
Beverly Hills, CA 90210
(213) 278-1111

Attorneys for Respondents

*Counsel of Record

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 10835 Santa Monica Boulevard, Suite 200, Los Angeles, California 90025; that on February 23, 1989, I served the within *Respondents' Opposition Brief to Petition for Writ of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.E.
Washington, D.C. 20543
(Original + 40 Copies)

G.L. Spence
Gary L. Shockey
Spence, Moriarity & Schuster
265 W. Pearl Street
P.O. Box 548
Jackson, Wyoming 83001
(3 Copies)

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 23, 1989, at Los Angeles, California.

Claude A. Lagardere
(Original signed)